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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COBB COUNTY, GEORGIA

Petitioner,

v.

BRUCE S. HARVEY and JAMES D. CUNNINGHAM,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the First Amendment of the U.S. Constitution mandate the complete elimination of religious related free speech by individuals in a public building or forum unless said speech is specifically approved by all non-religious individuals or organizations? Another way of stating this question is whether or not the A.C.L.U., by and through Respondents, should have an absolute veto power of Cobb County, Georgia's right to display the Ten Commandments in the Cobb County Courthouse pursuant to the gift of an individual.

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BRIEF OF THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Rutherford Institute, ("Amicus") respectfully submits this brief as amicus curiae in support of the petition for writ of certiorari filed by the petitioner, Cobb County, Georgia. Pursuant to Sup. Ct. R. 37.2, the parties have consented to the filing of this brief. Amicus has filed the Sup. Ct. R. 37.2 written consent with the Clerk of this Honorable Court.

INTEREST OF THE AMICUS CURIAE

The Rutherford Institute (hereinafter "Amicus") is a non-profit religious based civil liberties organization that defends the rights of persons of all religious faiths throughout the United States on a *pro bono* basis. Amicus defends school children that wish to pray before school, trains attorneys in First Amendment litigation and educates the general public regarding various

religious legal issues. [J.W. Whitehead, *The Rights of Religious Persons In Public Education*, 333 (Crossway Books, 1991)].

The Rutherford Institute's interest in this case is similiar to that promoted by the U.S. Congress and President Reagan's October 4, 1982 declaration that 1983 is the "Year of the Bible". Their interest (as well as Amicus') is:

> ...Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the Unites States;
>
> ...this Nation now faces great challenges that will test this Nation as it has never been tested before; and
>
> ....renewing our knowledge of and faith in God through Holy Scripture can strengthen us as a nation and a people...

[Public Law 97-280 (1982)]. Protection of religious rights for all Americans in the face of direct attack on those rights is the interest of Amicus.

SUMMARY OF ARGUMENT

The First Amendment of the United States Constitution does not prohibit the posting of a religious/historical document such as the Ten Commandments in a public forum when said document is designed as a tribute to an individual or family or an act of freedom of expression by an individual. Petitioner does not actively promote the document in question with money or extraordinary maintenance. Respondents have not shown any actual injury or standing to bring this lawsuit. Further, the lower court's decisions granted Respondents a *de facto* veto power over any efforts Petitioner made to retain the Ten Commandments display. This *de facto* veto power strips Petitioner and the individual of the opportunity to express their religious views in a public forum and is far beyond the graying line of Establishment Clause constitutional muster set out in "the

Lemon test". [*Lemon v. Kurtzman*, 403 U.S. 602 (1971)]. Freedom of opportunity, be it in thought, speech, action or belief is the backbone of the Bill of Rights. The present decision in this case must be reversed because it undermines Petitioner's freedom of opportunity. Finally, the lower courts never considered this case as a First Amendment Free Speech case instead of an Establishment Clause issue.

Certiorari should be granted pursuant to Sup. Ct. R. 10.1 (a) and (c).

ARGUMENT

ISSUE: Does the First Amendment of the U.S. Constitution mandate the complete elimination of religious related free speech by individuals in a public building or forum unless said speech is specifically approved by all non-religious individuals or organizations? Another way of stating this question is whether or not the A.C.L.U., by and through Respondents, should have an absolute veto power of Cobb County, Georgia's right to display the Ten Commandments in the Cobb County Courthouse pursuant to the gift of an individual.

The Constitution of the United States guarantees freedom *of* religion, *not* freedom *from* religion. [*Widmar v. Vincent*, 454 U.S. 263, 269 (1981)]. Specifically, clause 1 of the First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...". The orders of the Eleventh Circuit and the Middle District of Georgia unwittingly dictate freedom from religion because the courts allow Respondents absolute power to set out the requirements, if any, necessary to allow Cobb County's Ten

Commandments to remain on their courthouse wall. [*Harvey v. Cobb County, GA*, 811 F.Supp. 669 (M.D. Ga. 1993), hereinafter, "Harvey"]. Specifically, the District Court opined, "...the Court...give[s] Cobb County, in consultation with plaintiffs [Respondents], an opportunity to develop an education display including the Ten Commandments panel... If Cobb county fails to develop an appropriate display approved by the Court, the panel must be removed." [*Harvey*, 811 F.Supp. at 679]. The District even suggested that Respondents' expert be employed as a consultant for any proposed display. [*Id.*]. All that Respondents had to do to assure that Petitioner's display be removed was choose not to negotiate. The lower court orders granted Respondents an absolute veto power over Petitioner's Ten Commandments display[1] from Exodus 20:1-17.

Amicus acknowledges that the U.S. Constitution is designed to be anti-majoritarian and protect the dissenting minority views from the views of the majority of America. [*See e.g.*, *National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) and *Texas v. Johnson*, 491 U.S. 397, 404 (1989)]. Amicus respectfully asserts that the same Constitution protects the majority from the minority too. It does not take a master researcher to learn that Petitioner's view in the present case is the majority view. The cover of the April 4, 1994 *U.S. News and World Report* declares, "Spiritual America In God We Trust — Testing Personal Faith In A Cynical Age". Inside this magazine, a national opinion poll indicates that 93% of Americans believe in God. [*Id.* at 48]. This same poll shows that 55% of those surveyed believe that "God is the moral guiding force of American democracy". [*Id.* at 51]. Nearly half of those surveyed also believe that President Jefferson's "wall of separation" should not be absolute. [*Id.*]. Unfortunately, the influence of religion is on the decline in America. [*Id.* at 50]. Decisions such as the

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[1] The display in question also includes "the Great Commandment" from Matthew 22:34-40. For convenience, Amicus will collectively refer to both as "the panel" or "the Ten Commandments".

one in this case are a primary reason that religion is being strangled. Courts confuse the fact that "separation of church and state" simply means that the government should not try to run the church. Examples of the application of this rule include passing laws endorsing a state-run church or not allowing people the freedom of opportunity to worship as they choose. The First Amendment does not prohibit Christians from being involved in government. [*See e.g.* Jesse Jackson]. It prohibits politicians (the state) from running the church.[2]

Under the facts of Petitioner's case, the Gardner family *sua sponte* donated the Ten Commandments panel to the Cobb County Courthouse in 1939. [Petition for *cert.* at 3]. This was apparently an exercise of the Gardner's right to freedom of speech under clause 3 of the First Amendment. Justice O'Connor has noted, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect". [*Doe v. Small*, 964 F.2d 611, 617 (7th Cir. 1992), citing *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990)]. "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed". [*Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) and *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983)]. The Gardner's Ten Commandments panel has been in the Petitioner's Courthouse or on their grounds since 1939. Public courthouses have been used for individual free speech forums in times past for liberal causes and the same freedom of opportunity and equality should be accorded conser-

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[2] The U.S. News survey mentioned earlier noted that 78% of those surveyed believe that the "...president should be a moral and spiritual leader". [*Cf.*, *Life Magazine*, "Why We Pray", page 54 *et seq.* (March, 1994)].

vative points of view. [*See e.g., Texas v. Johnson*, 491 U.S. 397, 399 (1989) and *Cohen v. California*, 403 U.S. 15, 16 (1971)].

It is uncontested that county or state support of the Gardner's gift was *de minimus* at best. [Petition for *cert.* at 10-11. *Accord, Harvey*, 810 F.Supp. 672-673]. The focal point of Respondent's complaint is that they do not like what is said in the panel. "Over forty years ago, the Supreme Court recognized that while free speech breeds controversy, it must be protected." [*Americans United For Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1542 (6th Cir. 1992), citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)]. "Offense to moral and religious sensitivities does not constitute an injury in fact and is insufficient to confer standing" to sue. [*Gonzales v. North Tip of Lake County, Indiana*, 4 F.3d 1412, 1416 (7th Cir. 1993)]. It is naive for the courts below to enable Respondents to completely eliminate the Ten Commandments panel by refusing to work with Petitioner, but then in turn to expect Respondents to work with Petitioner to save said panel through a settlement. Two federal circuits have noted that the federal *courts* cannot obtain complete majority opinion agreement on this subject. It is not reasonable to believe adverse parties can agree better than judges on this issue. [*Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 309 (6th Cir. 1990) and *Kreisner v. City of San Diego*, 1 F.3d 775, 783 (9th Cir. 1993)]. Even though Respondents apparently did attempt, in good faith, to peacefully resolve this case; few other Respondents would be so fair. "Absolute power corrupts absolutely". [Bartlett's, *Familiar Quotations* 50th ed. "Lord Acton" 615:15 (Little, Brown & Co. 1982)].

By way of example, Amicus will take the Eleventh Circuit's logic out of Georgia and place it in Tennessee.[3] The Tennessee State Capital is in Nashville, Tennessee. On the

[3] Amicus knows that Tennessee is in the Sixth, not the Eleventh Circuit.

capitol grounds, surrounding the capitol, are approximately eight monuments.[4] The most significant for the purposes of this brief is the grave of President James K. Polk and his wife Sarah Childress Polk. Among the statements made on the Polks' tomb are:

1. "The excellence of Christianity was exemplified in his death."
2. "Asleep in Jesus";
3. "A noble woman, a devoted wife; a true friend, a sincere Christian.";
4. "Blessed are the dead which die in the Lord."

Approximately ten yards to the south of Polk's tomb is a state historical marker remembering the "Holy Rosary Cathedral" (1820), the first Catholic Church in Tennessee. This marker notes that Tennessee's first Catholic Bishop, R.P. Miles, was appointed on the present capitol site in 1847. To the north of Polk's grave is a statue of President Andrew Jackson.[5] Other monuments include U.S. Senator Edward Carmack's "Pledge To The South" (placed by the Womens Christian Temperance Union), which includes a reference to praying to God; a masonic time capsule; a statue of Alvin C. York, (a religious conscientious objector to war — until he became the greatest hero of W.W.I), and a copy of the Liberty Bell. The final statue, which overlooks the Tennessee Supreme Court, is in tribute to Civil War hero Sam Davis. This monument talks of the Lord "calling up earth's heroes" and quotes John 15:13.[6] Retaining the status

[4] Amicus presents the information relating to the monuments surrounding the Tennessee State Capital pursuant to F.R.E. 201, 202 and/or "Information Lodging". [*See e.g., Turner v. U.S.*, 396 U.S . 398, 412 fn. 15 (1970) and L. Caplan, *The Tenth Justice, The Solicitor General and the Rule of Law* at page 22 (A.A. Knopf Press, 1987)].

[5] Jackson's home, "The Hermitage", is a federal historic site, as is the church which President Jackson built, which is part of said historic site.

[6] "Greater love hath no man than this - that a man lay down his life for his friends."

quo on First Amendment rights conforms to the original intent of the Constitution. [*See generally*, J. Eidsmoe, *Christianity And The Constitution*, 355-378 (Baker Book House, Co. 1987)].

The present opinions in Petitioner's case would appear to allow a non-religious organization to either require Tennessee to place other monuments, which Respondents dictate, on the capitol grounds or in the alternative, the present standing monuments must be removed or greatly modified. This flies in the face of *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (*Brennen* concurring) which says that religious speakers *have the same right to public forums as non-religious speakers*. [*Accord Widmar v. Vincent*, 454 U.S. 263, 269 (1981)]. The Carmark and Davis monuments were placed on the grounds of the capitol pursuant to private, not public, funds according to the plaques attached to the monuments. The Polk grave does not indicate how funding for the grave occurred. "Religious speech may not be excluded from public forums just because passersby misunderstand the public role." [*Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993). *But see*, *Kaplan v. Burlington*, 891 F.2d 1024, 1029 (2nd Cir. 1989) and *Smith v. County of Albemarle*, 895 F.2d 953, 958-960 (4th Cir. 1990)]. The "free speech" wording of the monuments are subject to complete undermining by liberal groups under the Eleventh Circuit's grant of an absolute veto power. This same power, left unchecked, could also be used by conservatives to eliminate "X-Rated" art displays in public forums. While Amicus is not promoting obscenity, it is important for the Court to see the "Pandora's Box" the present order in this case creates.

Although the monuments on the Tennessee State Capitol grounds have religious overtones, the reason James K. Polk is buried on the Tennessee State Capitol grounds is because of *who* President Polk is — *not* the fact that he was a Christian. The other people honored are noted Tennesseans that happened to be religious. Under the case now before this Honorable Court,

each of the monuments discussed could be dismantled because of its religious overtones, even though the person, not his beliefs, are the focus of the honor conveyed to each. A person's beliefs and convictions are their greatest assets.

The order of the Eleventh Circuit does not address whether the Ten Commandments panel is a tribute to God or the Gardner family of Cobb County, Georgia's public service, personal beliefs and lives. While this issue has been acknowledged as important, no court has directly addressed this point. [*See Kreisner v. City of San Diego*, 1 F.3d 775, 782 and 786 (9th Cir. 1993)]. A precedent that says a public tribute to private citizens cannot acknowledge the honoree's views strips America of much of its history and culture. It would be a shame to eliminate a James K. Polk (or a *Reverend* Martin Luther King, Jr.) from their deserved places of honor because they personally believed in God. It would be illogical to honor Polk or King, but *not* for what they "stood for". Justice Brandeis said:

> There is in most Americans some spark of idealism, which can be fanned into a flame... the results are often extraordinary.

[Bartlett, *Familiar Quotations*, 50th ed. "Louis Dembitz Brandeis", 678:4 (Little, Brown & Co. 1982)]. Whether or not one agrees with President Polk's (or Reverend King's) views is not a legitimate reason to erase their beliefs and names from public monuments, roads, buildings and museums. [*Accord, Larson v. Valente*, 456 U.S. 228, 662-663 (1982) (Kennedy concurring). *See also, Murray v. City of Austin, Texas*, 947 F.2d 147, 154 (5th Cir. 1991)]. This Honorable Court has rejected focusing solely on the religious component of a challenged action/monument when deciding if said monument is constitutional. [*Lynch v. Donnelly*, 465 U.S. 668, 676-677 (1984)].

The decision of the Eleventh Circuit focuses only on the words of the Ten Commandments panel, not why the panel was placed in the Cobb County Courthouse. [*See Harvey*, 811

F.Supp. at 675 hn. 4]. "The public forum doctrine would be rendered meaningless if only places in the middle of nowhere could be free speech areas, and if all speech that occurred near 'structural symbols of government' had to be viewed as government speech". [*Kreisner v. City of San Diego*, 1 F.3d 775, 786 (9th Cir. 1993)]. By giving Respondents an absolute *de facto* veto power regarding the public display of the Ten Commandments panel, the lower courts are placing preference for non-religion over religion. This is in direct conflict with the Fifth Circuit which holds, "To the extent that the Establishment Clause prevents preferences for one religion over another it likewise prevents preferences for religion over non-religion" (or vice-versa). [*Murray v. City of Austin, Texas*, 947 F.2d 147, 155 (5th Cir. 1991)]. The notion that the Gardner's Ten Commandments panel, which was allowed to fall into dilapidation by Petitioner, poses "...a real danger of establishment of a state church is far-fetched indeed". [*Lynch v. Donnelly*, 465 U.S. 668, 686 (1984)]. As noted by the Seventh Circuit, "...the First Amendment is intended to restrict religious activity not by individuals but by the government". [*Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1168 (7th Cir. 1992)]. If Paul Robert Cohen can use a California courthouse to curse the draft, and Gregory Lee Johnson can burn the American Flag in front of a Texas courthouse, why can't the Gardner family use a Georgia courthouse to say, "Honor Thy Father and Thy Mother"? [*Cohen v. California*, 403 U.S. 15, 16 (1971); *Texas v. Johnson*, 491 U.S. 397, 399 (1989); and *Harvey*, 811 F.Supp. at 672]. The lower courts also violated the rule of *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) that suggests that courts must determine if the Gardner's Ten Commandments panel's placement was presented to Cobb County, Georgia "primarily if not entirely, by a legitimate secular purpose". In this case, that logical free speech secular purpose was the Gardner family reminding the citizens of Cobb County, Georgia of their family

and its generosity. [*See generally, A.C.L.U. v. Rabun County Chamber of Commerce*, 678 F.2d 1379, 1390 (11th Cir. 1982)].

As noted by the Tenth Circuit, the federal courts of appeals of four circuits are split over the issue of an individual's standing to attack a public display of a religious symbol, such as the Ten Commandments, on government property under the Establishment Clause. [*Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989)]. The Seventh Circuit requires avoidance or change of behavior because of the offensive symbol. The Tenth, Sixth and Eleventh Circuits simply require personal contact. [*Id.*]. A free speech issue gives Respondents even less standing to complain about the Gardner's 1939 gift to Petitioner. [*See e.g., Widmar v. Vincent*, 454 U.S. 263, 271 (1981)]. This conflict justifies a grant of certiorari by this Honorable Court pursuant to Sup. Ct. R. 10.1(a) and (c) because several circuits are at odds in this case and clauses 1 and 3 of the First Amendment conflict on the facts in this case. Who is doing the "talking" through the Ten Commandments panel — the Gardners or Cobb County, Georgia?

In conclusion, Amicus would respectfully note that even though the Petitioner's Ten Commandments panel stood alone in a corner of the Cobb County Courthouse, other symbols apparently adorned other, and more prestigious, parts of the courthouse. At least one Respondent noted that the panel indicates the influence of religion in general and Christianity in particular on our government and court system. [*Harvey* 811 F.Supp. at 673, point 13]. This is not an attempt by Petitioner to exalt one religion over another. It simply acknowledges the historical value of the Ten Commandments to American jurisprudence and the Gardner family to local history. This would be the same basic reason that Nashville, Tennessee's Women's Christian Temperance Union placed "Carmack's Pledge to the South" upon the Tennessee State Capital grounds — to honor a person and his beliefs. History, such as conveyed by the Ten

Commandments panel, shows an unbroken practice of honor to individuals such as the Gardner family who just happen to be religious. The historic significance of the Ten Commandments (or individuals and their views) "...is not something to be lightly cast aside".[7] [*Murray v. City of Austin, Texas*, 947 F.2d 147, 115 (5th Cir. 1991), citing *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)].

CONCLUSION

As noted in *Lynch v. Donelly*, 465 U.S. 668, 676-677 (1984):

> The very chambers in which oral arguments on this case were heard is decorated with a notable and permanent — not seasonal — symbol of religion: Moses with the Ten Commandments.[8]

If the decision of *Harvey v. Cobb County, GA*, 811 F. Supp. 669 (N.D. Ga. 1993) remains precedent, in direct contradiction of multiple cases from this Honorable Court, the Ten Commandments will be stripped from the Cobb County Courthouse wall. The next logical step is to sandblast President Polk's grave because it acknowledges his belief in God. The chambers of this Honorable Court cannot be far behind. Finally, will even the Declaration of Independence be removed from state and federal buildings? [*See generally*, J.W. Whitehead, *The Second American Revolution*, 93-100 (Crossway Books, 1982)]. It is illogical to give Respondents an *absolute* veto power regarding the decorations of Petitioner's courthouse. Justice Holmes said,

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[7] "The Supreme Court has raised, but never resolved, the question of whether avoiding an Establishment Clause violation provides a compelling state interest justifying a content-based restriction on speech in a public forum." [*Kreisner v. City of* San Diego, 1 F.3d 775, 783 (9th Cir. 1993)].

[8] Members of this Honorable Court that were sitting during the building or planning stages of the present U.S. Supreme Court Building include: Taft, Hughes, Stone, Holmes, Brandeis and Cardozo among others.

"If there is a principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate". [*U.S. v. Schwimmer*, 279 U.S. 644, 653 (1928)]. Protect the Gardner's constitutional opportunity to express their thought! Certiorari should be granted.

This 24 day of May, 1994.

Respectfully submitted,

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